Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1944.

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2-16-44—100

No. 723

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IN THE

Supreme Court of the United States

October Term, 1943.

(Consolidated Causes: California Supreme Court, L. A. No. 18066)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3783)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent.

(Superior Court No. 3817)

APPENDICES A, B AND C.

Opinions Heretofore Rendered and Pertinent Constitutional and Statutory Provisions.

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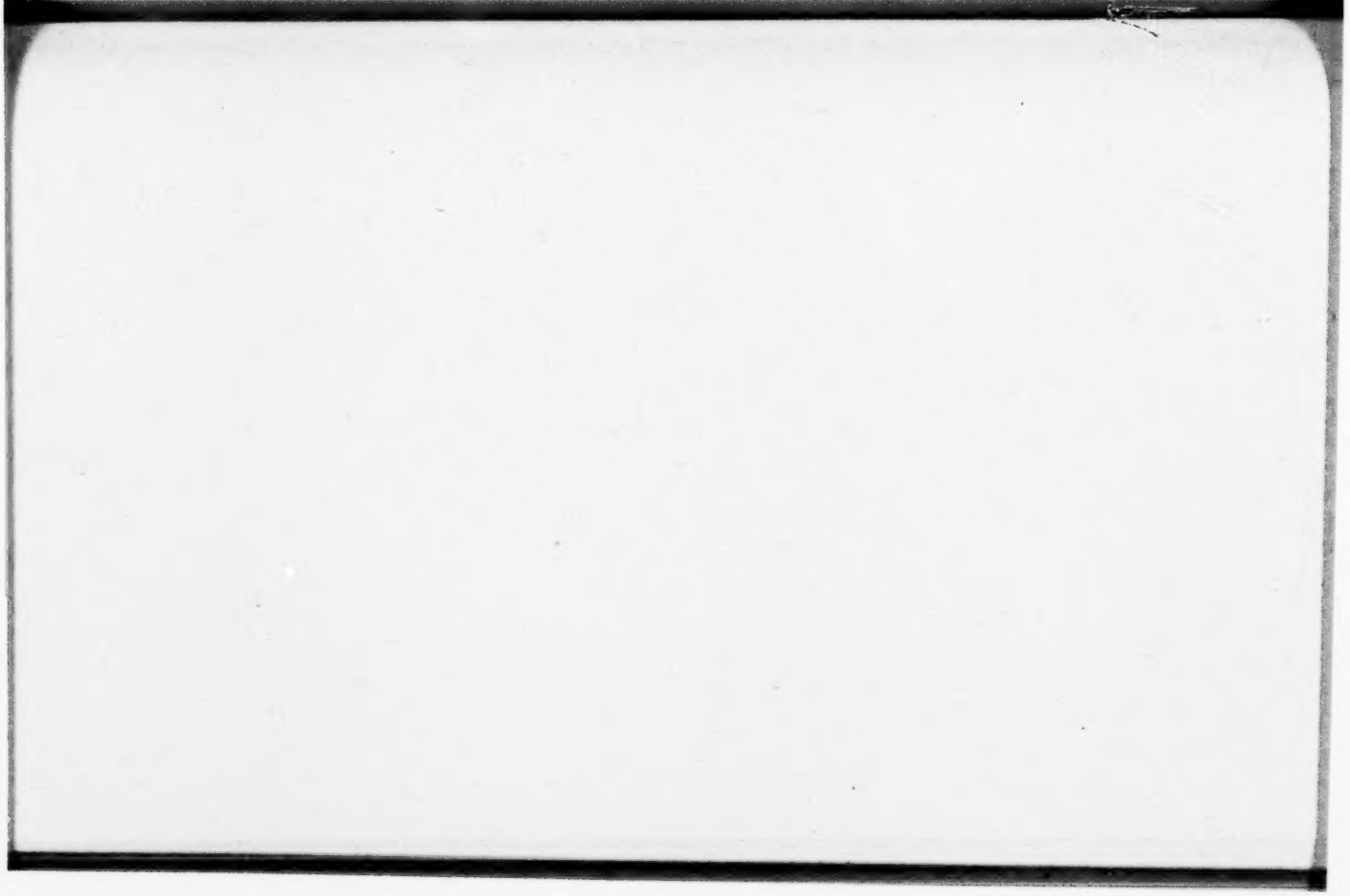

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APPENDIX A.

Filed Nov. 4, 1943, A. V. Haskell, Clerk.

[Reported in 23 A. C. 190. and also in 143 Pac. (2d) 12.]

See dissenting opinion.

In the Supreme Court of the State of California in Bank.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation, *et al.*, Defendants and Appellants.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation, et al., Defendants and Appellants. L. A. No. 18,066 (consolidated cases).

In 1913, the defendant City of Los Angeles completed its acqueduct to the Owens River Valley and, from 1919 to 1937, diverted into it virtually all the flow of the Owens River, which formerly emptied into Owens Lake, a body of salt water without outlet. As a result the lake dried up and its subsurface became a crystalline cake impregnated with brines containing valuable chemicals. On the shores of the dry lake plaintiff had two plants to which brines pumped from wells on the bed of the lake were piped for the production of soda products. Plaintiff acquired the older of the two plants in 1932, when it leased mineral rights in the lake from the State of California. Plaintiff subsequently extended its pipe lines several miles farther along the bed of the lake, drilled wells, and installed pumps and brine heaters, acquiring the necessary leases and rights of way from the state. The brines thus made available were of higher alkalinity

and therefore of greater value than those previously obtained. To improve its efficiency in extracting chemicals from the brines so as to increase production, plaintiff built a new plant and adopted a new process.

Plaintiff's operations were possible because of the dehydrated state of the lake bed, the continuation of which depended on the absence of any substantial flow of water from Owens River into the lake. The extent of the flow was determined by the manner in which defendant operated its aqueduct. Its dam across Owens Valley, forming Tinnemaha Reservoir, served to regulate the flow of the river. Below the dam, the water, which flowed through its natural channel until it reached Intake, could be directed into the aqueduct proper by means of defendant's diversion dam, or into Owens Lake if the gates in the dam were opened.

On February 6, 1937, before plaintiff's new plant could be put into operation, defendant opened the gates at Intake, thereby causing a large amount of water to flow into the lake. Defendant continued to direct the water into the lake intermittently until July 1, 1937, and the surface of the lake became flooded to a depth of three or four feet. The water inundated much of plaintiff's plant, causing substantial physical damage and reducing the alkalinity, and therefore the value, of the subsurface brines by keeping them at a low temperature. As its properties were wholly inaccessible until July, 1937, and partly so until September, 1937, plaintiff was unable to resume operations until October, 1937. Defendant released altogether approximately 50,000 acre feet of water into the lake. There was evidence that it could have stored some of this water in Tinnemaha Reservoir for later release down the Santa Clara River or onto the

Mojave Desert, and could have spread the remainder in the Owens River Valley.

On December 17, 1937, plaintiff brought suit for an injunction. On December 30, 1937, plaintiff's claim for damages was received by the mailing clerk of the water department, and upon its rejection plaintiff filed its action for damages. These actions were consolidated for trial. The injunction was denied, and judgment was entered awarding plaintiff $153,578.85. From this judgment defendant appeals.

It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed. (*Chowchilla Farms Inc. v. Martin*, 219 Cal. 1; *Matheson v. Ward*, 24 Wash. 407; *Pere Marquette Ry. Co. v. Siegel*, 260 Mich. 89; *Mathewson v. Hoffman*, 77 Mich. 420; *Kray v. Muggli*, 84 Minn. 90; *Peter v. Caswell*, 38 Oh. St. 518; *Delaney v. Boston*, 2 Har. (Del.) 489; *Shepardson v. Perkins*, 58 N. H. 354; *Hammond v. Antwerp Light & Power Co.*, 230 N. Y. S. 621, 634; *Ford v. Whitlock*, 27 Vt. 265; *Smith v. Youmans*, 96 Wisc. 103.) Thus in the *Chowchilla Farms* case the court held, in recognition of the rights of those with lands riparian to a changed channel, that the flow could not be returned to its former bed. It has also been held that the rights of those who improve land previously submerged would be infringed if the land were submerged again (*Mathewson v. Ward, supra;* see cases collected in 88 A. L. R. 142, *et seq.; San Gabriel V. C. Club v. Los Angeles*, 182 Cal. 392, 397.) A change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to

regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural. (See *Chowchilla Farms Inc. v. Martin, supra,* and cases there cited.)

Some jurisdictions do not afford this protection if the diversion can be continued only by maintaining a structure such as a dam (*Drainage Dist. v. City of Everett,* 18 P. (2d) 53 [Wash.]), apparently because it would be an excessive burden for one to maintain a dam that is of no further use to him. When the owner maintains the dam but alters the flow to increase his profit at the expense of those below him, or merely to be arbitrary, it is reasonable to require that the alterations shall not injure those who have relied on the customary operation of the dam in the past. (*Kray v. Muggli, supra; Smith v. Youmans, supra; Pere Marquette Ry. Co. v. Siegle, supra; Hammond v. Antwerp Light & Power Co., supra;* see *Ice Co. v. LaPlant,* 136 Iowa 621, 633; *Greisinger v. Klindhardt,* 321 Mo. 186; *Mitchell Drainage Dist. v. Farmers Irrigation Dist.,* 127 Neb. 484.)

In the present case defendant not only diverted the flow of the Owens River for many years, but augmented it by such activities as the digging of wells and drainage ditches, so that the diversion appeared to be permanent. The gates in defendant's dam did not dispel the impression of permanence, for it was evident from the continued dryness of the lake that they were kept closed. Reliance on the permanence of the diversion was therefore natural; moreover, it was highly desirable, for it motivated the development of natural resources of substantial value. The findings, amply supported by the evidence, establish that defendant could easily have found an outlet for the surplus water instead of causing it to

flow into the lake. While the flow of water was unusually large for a brief period, it would have been within the capacity of the acqueduct had it been stored temporarily in available space, and gradually released where it could do no harm. Defendant attempted to prove that it released the water with a high boron content to lower the boron content of the water flowing into the acqueduct. There was evidence, however, that the boron content of the water used by defendant had never been high and that it was not substantially lowered by releasing the water. In any event, defendant could have released the boron-bearing water elsewhere. These findings are sufficient to establish liability, and it is therefore unnecessary to consider the additional finding that defendant was negligent in failing to construct sufficient headwater storage.

Defendant contends that since an appropriative right is limited by the needs of the appropriator (Cal. Const., art. XIV, sec. 3; Civ. Code, sec. 1411), it was under an obligation to release the water that it did not need into the Owens River channel at Intake. These constitutional and statutory provisions, designed to insure a reasonable division of a limited water suppiy, have never been construed as requiring a particular disposition of surplus water, least of all a disposition harmful to the recipient. The constitutional mandate forbidding "the waste or unreasonable use of water," far from requiring, actually forbids a disposition that would entail not only waste of water but damage to valuable natural resources.

Defendant also contends that as a riparian owner it had the right to the full flow of the Owens River past its lands below Intake. Such a right, however, would clearly exceed that allowed by the Constitution, which provides that "The right to water . . . shall be limited to such

water as shall be reasonably required for the beneficial use to be served . . ." (Cal. Const., art. XIV, sec. 3), for defendant makes no claim that it has any beneficial use for the water.

In addition to other items, plaintiff was awarded damages for loss of profits, which defendant contends was not proved with certainty. The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. (*California P. Mfg. Co., Inc. v. Stafford Press Co.*, 192 Cal. 479, 485; *Gibson v. Hercules Mfg. Co. Inc.*, 80 Cal. App. 689.) If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. (*Sobelman v. Maier*, 203 Cal. 1, 9; *Pacific etc. Co. v. Packers Ass'n*, 138 Cal. 632; *Landon v. Hill*, 136 Cal. App. 560; *Pye v. Eagle Lake Lumber Co.*, 66 Cal. App. 584; *Hacker v. Chapman Mfg. Co.*, 17 Cal. App. (2d) 265.) In the present case plaintiff's probable gross receipts could be estimated from its sales in the preceding two years, in view of the evidence that prices were stable. Its unit costs could be estimated on the basis of detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties for the limited operations carried on in 1938. Its plant capacity was conservatively estimated at 90 tons per day, since plaintiff's old plant, using the "carbonating process" had a proved capacity of from 35 to 40 tons a day, and the capacity of the new "Mono Process" plant had been increased from 50 to 100 tons a day. Awards of prospec-

tive profits have been sustained on the basis of much less satisfactory evidence. (See *Pacific etc. v. Packers Ass'n, supra; Shoemaker v. Acker*, 116 Cal. 239; *Hacker v. Chapman Mfg. Co., supra; Landon v. Hill, supra; Story Parchment Co. v. Paterson Co.*, 282 U. S. 555; *Barrett Co. v. Panther Rubber Co.*, 24 F. (2d) 329.) Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated. (*Sobelman v. Maier, supra*, at p. 9; *Schumann v. Karrer*, 184 Cal. 50, 57; *Meer v. Cerati*, 53 Cal. App. 497.)

Defendant relies on the fact that in the years immediately preceding the flooding plaintiff did not make a profit. A comparable problem was presented in *Buxbaum v. G. H. P. Cigar Co.*, 188 Wisc. 389, where the defendant broke a contract giving the plaintiff a right to sell cigars of the defendant's manufacture. Although no profit had previously been recovered from the sale of the cigars, the plaintiff was able to show that its expenses in the year the contract was broken were low enough to have permitted a gain from sales in that year, and recovery of prospective profits was allowed. In the present case plaintiff was engaged during the two years immediately preceding the tort in converting its plant, and it maintained its sales position by selling soda products purchased elsewhere. The court might well have concluded that profits were probable, since the completion of alterations enabled plaintiff to sell products from its own plant.

Defendant contends that plaintiff's damages should be determined on the basis of opinion evidence concerning the value of plaintiff's properties before and after the tort. While this method is the usual one for determining damages for trespass to real property, it yields to others

if they are more appropriate to a particular situation. (See *McCormick, Damages*, p. 482, *et seq.*; 15 *Am. Jur.* 514.) In the case of a reparable injury, a frequent measure of damages is the cost of making repairs plus the value of the use of the premises for the period during which the tort has deprived the owner of the property. (*Linforth v. S. F. Gas & Electric Co.*, 156 Cal. 58; *Green v. General Petroleum Corp.*, 205 Cal. 328; *Higgins v. L. A. Gas & Electric Co.*, 159 Cal. 651, 662; *Kell v. Jansen*, 53 Cal. App. (2d) 498.) Similarly, in the present case damages were given for the physical destruction resulting from the tort, and the value of the use of plaintiff's properties was properly estimated on the basis of the probable profits that would have been derived from their operation. Moreover, plaintiff's properties are a complex aggregation of real and personal property, of pumps, plant, pipe lines, and mineral rights. It is common knowledge that such plants do not frequently change hands, and that in a sale the price is likely to be based on considerations peculiar to the plant. Expert opinion as to the market value of such a plant is likely to be based on nothing more substantial than the probable returns from the operations of the plant. A more accurate assessment of damage can be obtained by estimating loss of profits directly. (*Inyo Chemical Co. v. City of Los Angeles*, 5 Cal. (2d) 525; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209; *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 73, 84; see *Weill, "Value of the Use," in Non-Renting Localities*, 13 Cal. L. Rev. 373.)

Defendant invokes section 363 of the Charter of Los Angeles, providing that "Every claim and demand against the city shall be first presented to and approved in writing by the board, officer or employee authorized by this

charter to incur the expenditure or liability represented thereby," and section 376, providing that "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part . . . Except in those cases where a shorter period is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damage arose . . ." Plaintiff presented his claim by mailing a copy of it to the Department of Water and Power. Upon receiving it the mailing clerk of the department gave it to the chief clerk of the legal division, who forwarded it to the deputy city attorney in charge of water matters, and the latter sent it to the board of water commissioners, advising its rejection.

It is settled that the board of water commissioners is "the board . . . authorized by this charter to incur the expenditure" here involved. (*Douglass v. City of Los Angeles*, 5 Cal. (2d) 123, 134; *Continental Ins. Co. v. City of Los Angeles*, 92 Cal. App. 585; see *Huey v. City of Los Angeles*, 137 Cal. App. 48.) It is likewise settled that the requirement that a claim be presented to such a board is satisfied by presentation to a subordinate who represents the board for the receipt of such claims from the public. (*Douglass v. City of Los Angeles, supra; McCandless v. City of Los Angeles*, 10 Cal. App. (2d) 407; *Sandstoc v. Atchison T. & S. F. Ry. Co.*, 28 Cal. App. (2d) 215.) It is the function of the board to supervise the water department, which operates the waterworks of Los Angeles and controls the water revenue fund (Los Angeles Charter, sec. 71; 220(1)(7)), and the members

of the department are therefore the subordinates of the board and may represent it in receiving claims. (*McCandless v. City of Los Angeles, supra;* see *Douglass v. City of Los Angels, supra,* at p. 134.) A claim may be presented by registered mail, as in the present case (see *Metcalf v. Metropolitan Life Ins. Co.*, 1 Cal. App. (2d) 481), and the mailing clerk of the water department is the subordinate charged with receiving claims so presented. The fact that the claim passed through many hands before it was actually considered by the board of water commissioners signifies merely that the board wished to be advised of the merits of claims before considering them. Defendant's claim was therefore filed with the appropriate officer.

The question remains whether it was filed "within six months after the occurrence from which the damage arose." Beginning on February 6th, defendant opened the gates in its dam intermittently until the last day of June. The water reached its peak in May, and did not entirely disappear until some time in September. The claim was filed on December 30.

The principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against it, so that it may settle those of merit without litigation. (*Western Salt Co. v. City of San Diego*, 181 Cal. 696, 699; *Sandstoe v. Atchison T. & S. F. Ry. Co.*, 28 Cal. App. (2d) 215, 223; see 18 *Cal. Jur.* 1109.) That purpose is best served if the entire sequence of events giving rise to the injury is

regarded as the "occurrence from which the damage arose," for damages can be assessed accurately only when the sequence is completed and the total injury taken into account. Thus, in the present case the injuries continued to accumulate but were not entirely apparent so long as water remained on the lake bed. (See *Haigh v. City of Los Angeles,* 139 Cal. App. 595.)

Defendant contends that the case of *Powers Farm v. Consolidated Irrigation District,* 19 Cal. (2d) 123, requires a different construction of the charter provision. That case, however, involved a different statute, and since no claim had been filed the court was concerned with determining, not the time within which a claim had to be filed, but whether the presentation of any claim was required. To hold that plaintiff was required to present a claim for the entire damage to its property by September 6th, six months after the initial flooding established the inevitability of damages, would require an unreasonable construction of the language of the charter provision, for the last flooding contributed to the injury as well as the first, and it would therefore be inaccurate to say that the first flooding was "the occurrence from which the damage arose." Moreover, the lake was still partially inundated on September 6th, and some of the damage was yet to occur. Since plaintiff's plant was wholly inaccessible until July, and partly so until September, plaintiff would have had only a brief interval in which to ascertain and evaluate the damage and could hardly have prepared a claim by September 6th, in compliance with the charter provision

that "No demand can be approved . . . unless it specify each several item, with the date and amount thereof." (Los Angeles Charter, sec. 368.) Hence, if plaintiff were required to present a claim by that date, the charter would have the effect of denying plaintiff the right to recover for much of the injury to his property. The state Constitution, however, provides for the right to compensation for the damaging of property for the public use (Cal. Const., art. I, sec. 14). A municipality can prescribe reasonable procedures for the enforcement of this right (*Crescent Wharf etc. Co. v. City of Los Angeles*, 207 Cal. 430), but cannot enact legislation that would operate to prevent or unduly hamper the enforcement of such a right. (*Douglass v. City of Los Angeles*, 5 Cal. (2d) 123, 128; *Geimann v. Board of Police Comm'rs*, 158 Cal. 748; see *Rafferty v. City of Marysville*, 207 Cal. 657, 665; see 5 *Cal. Jur.* 780; 34 *Am. Jur.* 32.) The same considerations apply to defendant's contention that plaintiff was required to file its claim within six months from the day in May that the water reached its peak. Additional water was released after that day augmenting the injury.

Defendant contends that plaintiff's rights are barred on the ground that it failed to comply with the statute providing that "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works, or property, a verified claim shall be presented with the clerk . . . of

the legislative body of the municipality . . . within ninety days after such accident has occurred." (Stats. 1931, p. 2495, *Deering's Gen. Laws*, Act 5149.) This statute is inapplicable, however, for the damage in the present case arose, not from the dangerous condition of any public property, but from defendant's acts. (*Ogando v. Carquinez G. School Dist.*, 24 Cal. App. (2d) 567; *Jackson v. City of Santa Monica*, 13 Cal. App. (2d) 376.)

Defendant invokes as statutes of limitation sections 315, 316, 320, 338(2), 339(1), and 343 of the Code of Civil Procedure. Sections 315 and 316 relate to the acquisition of title by adverse possession, but defendant has submitted no evidence that it has acquired such title. Section 320 relates to certain rights under Mexican Land Grants (see the note by the Code Commissioners in Code Civ. Proc. 1872, sec. 320) and is inapplicable here. Plaintiff's action was brought well within the period prescribed by the other sections.

The judgment is affirmed.

TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*,
CURTIS, *J.*,
CARTER, *J.*,
SCHAUER, *J.*

See Dissenting Opinion.

Natural Soda Products Co. v. City of Los Angeles
L. A. No. 18,066.

DISSENTING OPINION.

I dissent:

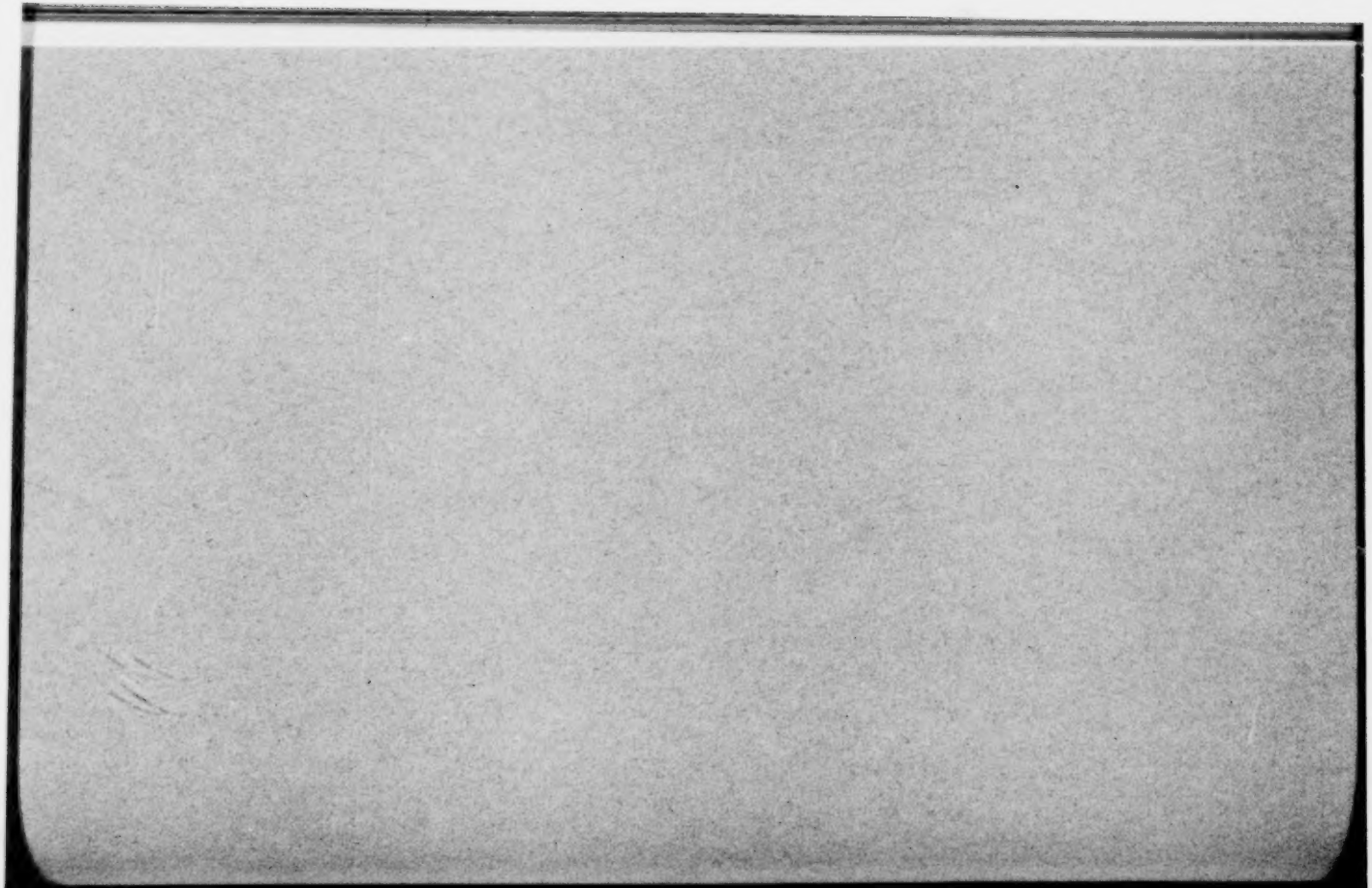
The prevailing opinion holds that the requirement that a claim be presented within six months "after the occurrence from which the damages arose" is met when the claim is presented within six months after the last of a series of occurrences which caused the damage, and, presumably, that recovery may be had for the entire damage including the damage arising from acts occurring more than six months prior to the presentation of the claim. I agree that a claim may properly be presented within six months from the last occurrence giving rise to damage but I do not agree with the holding that recovery may be had for damage arising from occurrences which happened prior to the beginning of the six months period.

The purpose of the requirement for filing claims is not only to provide the municipality with information so that it may settle claims without litigation. Another very important purpose, in a case of continuing damage, such as the present one, is to give the city an opportunity to provide protection against damage by the continued acts complained of, should it deem itself liable. Therefore the rule stated in *Powers Farms v. Consolidated Irr. Dist.* 19 Cal. (2d) 123, 129, that "where the time and extent

of injury are uncertain, a statutory period of limitations begins to run when the fact that damage is occurring becomes apparent and discoverable, even though the extent of the damage may still be unknown," has a sound basis in reason and justice. If, as was apparent in the present case, a continuation of the acts would result in a loss to the plaintiff, either total or partial, both reason and justice required that the municipality be apprised of the first occurrence causing damage at least within the time required by law, rather than that the plaintiff be permitted to remain silent until the damage mounted to a total loss. To hold the plaintiff thus to the requirement is not at all to effect a disregard of the language of the charter provision. On the contrary, it is a compliance with the plain terms thereof. It does not follow that to require compliance would be to deprive the plaintiff of a constitutional right to compensation for damaging private property for public use. It is settled that although the constitutional provision is self-executing, the legislature may properly set up a procedure for the recovery of the damages, and that the filing of a claim within a specified period of limitations is a proper step in such procedure. "Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages." (*Powers*

Farms v. Consolidated Irr. Dist., supra, 19 Cal. (
123, 126; *Davis v. East Contra Costa Irrigation D*
19 Cal. (2d) 140; *Rose v. State of California,* 19
(2d) 713, 725; *Crescent Wharf & Warehouse Co. v.*
Angeles, 207 Cal. 430; *Los Angeles Athletic Club v. L*
Beach, 128 Cal. App. 427.)

SHENK,



APPENDIX B.

[Dist. Court of Appeal—Fourth Dist. Filed Dec. 14, 1942. M. C. Van Allen, Clerk.]

[Reported in 56 A. C. A. 108, and also in 132 Pac. (2d) 553.]

In the District Court of Appeal, in and for the Fourth Appellate District, State of California.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. The City of Los Angeles, a municipal corporation; Department of Water and Power of the City of Los Angeles, Defendants and Appellants.

Natural Soda Products Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation; Department of Water and Power of the City of Los Angeles, Defendants and Appellants. Civil No. 2981.

OPINION.

Appeal from a judgment of the Superior Court of Inyo County, Hon. Wm. D. Dehy, Judge. Judgment reversed.

For Appellants: Ray L. Chesbro, City Attorney; S. B. Robinson, Chief Assistant City Attorney for Water and Power; Samuel Poorman, Jr., Assistant Attorney; Robert E. Moore, Jr., and Rex B. Goodcell, Jr., Deputies City Attorney; A. E. Chandler, Special Counsel. By Samuel Poorman, Jr.

For Respondent: Kenneth Ferguson, Jess G. Sutliff.

Amicus Curiae: Earl Warren, Attorney General; Everett W. Mattoon, Assistant Attorney General; Burdette J. Daniels, Deputy Attorney General.

This is an appeal from a judgment denying plaintiff an injunction to restrain defendants from permitting water to flow into Owens Lake in Inyo County, and awarding plaintiff $153,573.85 damages caused by waters from the Owens River flooding Owens Lake.

The action seeking an injunction was filed on December 17, 1937. An amended complaint was filed on which the cause went to trial. It was alleged that Owens Lake, which belongs to the State of California, is situated in the westerly part of Inyo County and, prior to the past twenty years, was fed by the waters of the Owens River which had its headwaters in Mono County and flowed southerly into Owens Lake; that defendants constructed an aqueduct in connection with the water supply of the City of Los Angeles; that this aqueduct headed in Owens River, a number of miles north of Owens Lake; that by means of this aqueduct all of the water was diverted from the Owens River; that thereupon Owens Lake commenced to dry up and became "substantially dried up"; that its subsurface waters thereby acquired a degree of salinity and were impregnated with salts of considerable value; that plaintiff, relying on the continued diversion of the waters of the Owens River and the continuance of Owens Lake as a dry lake, acquired property on the banks of Owens Lake and in its bed and improved the same at a cost of more that $500,000.00; that it acquired leases on the bed of the lake from the State of California; that on December 15, 1937, while plaintiff was engaged in its business of pumping the subsurface waters from the Owens Lake and extracting chemicals therefrom, defendants suddenly ceased diverting the waters of the Owens River into its aqueduct and "commenced to divert said waters or a substantial part thereof into Owens Lake"

and to "threaten to continue to divert the waters of said Owens River out of said aqueduct and into Owens Lake" thereby diluting the subsurface waters and irreparably damaging plaintiff's property and business.

On May 28, 1939, plaintiff filed its action to recover damages caused by the flooding of Owens Lake by the waters of Owens River. A second amended complaint was filed (which we will refer to as the complaint) upon which the action went to trial. The actions were consolidated for trial and are presented here on a single record.

This complaint in the damage action contained two counts. The first repeated the material allegations of the action for injunction and enlarged on them. It also alleged the particular properties of plaintiff and the damages it suffered from the flooding of Owens Lake.

It alleged the construction of the aqueduct, the taking of the water of the Owens River and the consequent drying up of Owens Lake; "that in reliance upon said condition and upon the continued diversion of said waters of said Owens River by defendants into said aqueduct" plaintiff purchased its described properties about April 15, 1932, improved these properties, acquired others, and operated its works for the extraction of soda ash and kindred products from the subsurface waters of Owens Lake; that the aqueduct was a permanent structure and constituted a permanent new channel for the waters of the Owens River.

> It was particularly alleged "that the evaporated condition of said Owens Lake and the resultant alkilinity of subsurface brines of said Owens Lake are absolutely necessary to plaintiff's operations, which are predicated thereupon, and are of extreme

value to plaintiff; and that, until the diversion of waters onto and the flooding of Owens Lake by defendants, as hereinafter set forth, said Owens Lake was, and for many years had been, in a dried up and evaporated condition so that its subsurface brines were, during the cold fall and winter months of each year, high in alkalinity and available to plaintiff for its continued operations predicated thereupon.

"That at all times since April 15, 1932, when plaintiff acquired its said improved properties on Owens Lake, defendants have known of plaintiff's ownership thereof and of the large, conspicuous, substantial, and permanent character of plaintiff's plant and property, and that plaintiff's operations depend upon the continuance of Owens Lake as a dry and evaporated lake, and that plaintiff has and does in the conduct of its operations maintain expensive pumps, pipelines, power lines, roads, and other plant equipment upon the bed of and on lands riparian to Owens Lake, and that plaintiff acquired said properties and plant and has made its improvements thereupon all in reliance upon the continued maintenance of Owens Lake as a dry and evaporated lake; that the foregoing facts are known, and at all times hereinafter mentioned were known, to defendants . . .

"That at divers times, commencing during the first week in February, 1937, and continuing throughout the year 1937 and to and including December, 1937, . . . defendants suddenly ceased to so transfer and conduct the waters of said Owens River into said aqueduct, and suddenly and without plaintiff's consent, . . . defendants persisted in diverting said waters out of said aqueduct and into said Owens Lake until and so that the bed of said Owens Lake and a substantial portion of aforesaid plant and

properties of plaintiff were, at places normally and theretofore dry and exposed, flooded to the average depth of between three and four feet for the period commencing February, 1937, and continuing until December, 1937, and made wholly inaccessible to plaintiff for the period commencing February, 1937, and continuing until July and August, 1937."

The second cause of action in the damage action repeated many of the allegations of the first cause of action and alleged that the diversion of the waters from the aqueduct was wantonly, negligently and carelessly done. It was further alleged that means of disposing of these waters were available to defendants but were not used by them.

The State of California, through the Attorney General, appeared in the trial court as *amicus curiae* and has filed a brief here. California is the owner of the lake and licensor of certain rights in the subsurface brines of Owens Lake and had received royalties from plaintiff and others who extracted chemicals from those brines. The State maintains that the value of its brines were lessened by the fresh waters flowing into Owens Lake from Owens River.

Defendants argue at considerable length that the complaints do not state facts sufficient to constitute causes of action. As the same questions are involved in a consideration of the sufficiency of the evidence to support the judgment we prefer to go to the merits of the case.

The trial judge found the facts in favor of plaintiff. He denied the injunction on the grounds that the injuries were compensable in damages in an action at law and that an injunction would cause great injury to defendants.

The trial court particularly found that the defendants "had appropriated, in excess of 4000 second feet mean annual flow of water from Owens River and its tributaries, which appropriated amount is greater than any recorded mean annual flow of water in Owens River and its tributaries" (the evidence discloses this appropriation to be several times the mean annual flow of water); that "defendants took all, or substantially all, of the water from Owens River and its tributaries into their aqueduct system"; that defendants acquired virtually all of the lands riparian to Owens River and virtually all the water rights and water-bearing land, and virtually all of the extensive irrigation and water spreading facilities in Owens Valley and discontinued their use so that the agricultural land in the valley returned to "a general state of non-productivity, desert-like in character"; that they dug many wells and pumped a substantial part of the underground waters into the aqueduct system; that "during said many years prior to both 1932 and 1937, and by defendants' taking and exclusion of water from the extensive agricultural lands of Owens Valley which had theretofore enjoyed it, defendants materially affected and increased the flow of water in the lower reaches of the Owens River and drastically and radically changed the physical situation in the Owens Valley with respect to water and the flow and regimen of the Owens River from that which had obtained prior to defendants' said acts, and prior to the many years prior to both 1932 and 1937."

It was further found that "for many years prior to both 1932 and 1937 defendants took all or substantially all of the flow of the Owens River into their said aqueduct system and virtually none of said water was diverted therefrom or permitted to flow onto the exposed dry lake bed

of Owens Lake; . . . that by their said manner of construction, use, and operation of their said aqueduct system and its appurtenant facilities and their said overt acts and conduct, as aforesaid, for many years preceding both 1932 and 1937, defendants, and each of them, evidenced their intention and design to take, and did take, and represented in fact and deed that they would take, and led all interested persons to reasonably believe that they would take and continue to take, into their said aqueduct system, all of the flow of Owens River which they could take up to the reasonable capacity of said aqueduct system and its appurtenant facilities, reasonably constructed and reasonably operated"; that plaintiff relied on this conduct in the purchase and improvement of its plant and because of these representations by conduct for many years believed that Owens Lake would remain a dry lake; that the works of defendant were permanent and constituted a new channel for Owens River. It was also found that defendants were negligent in the construction and operation of their aqueduct system.

We find the following in the conclusions of law:

> "That defendants' aqueduct system and defendants' taking of the flow of Owens River through said aqueduct system were and are, and were and are fully intended by defendants to be, permanent in nature, construction, and operation; that plaintiff was and is entitled and had and has the right to, and did and does, rely upon the permancy of said aqueduct system and upon said aqueduct system being operated as it had been operated for many years prior to both 1932 and 1937 so that the bed of Owens Lake was dry and exposed; that plaintiff was and is entitled, and had and has the right to, and did and does, rely upon defendants' continued use and taking of the

flow of Owens River up to the reasonable capacity of an aqueduct system reasonably constructed and reasonably operated by defendants without diverting and flooding any of the same upon Owens Lake; and that in consequence thereof and of such right to rely, plaintiff did, so relying, acquire the substantial plant and properties in the course of the former natural flow of the Owens River more particularly referred to in the foregoing findings of fact.

"That defendants, having changed the natural flow of Owens River, and having diverted and taken substantially all of the flow of Owens River into their aqueduct system for a substantial period of time and under the circumstances set forth in the foregoing findings of fact, had and have no right to change the nature of that established diversion and taking as they did in the spring and summer of 1937 because such change did and will destroy and interfere with plaintiff's rights which have accrued."

At the commencement of the present century, the City of Los Angeles was outgrowing its then domestic water supply, the Los Angeles River, and turned to the Owens Valley for relief from the coming shortage. It acquired water rights there and built the Los Angeles Aqueduct which headed in the Owens River about forty-five miles north of Owens Lake and terminated in the San Fernando Valley. This aqueduct was put in operation in 1913 and thereafter about seventy-five per cent of the water supply of the city was obtained from the aqueduct and twenty-five per cent from the Los Angeles River. A small part of the Owens River water was used to replace water rights of farmers in the San Fernando Valley who, in exchange, had conveyed their riparian rights in the Los Angeles

River to the city. Otherwise the entire supply was used for domestic and municipal purposes.

A weir was built across the Owens River to raise the river water to the level of the aqueduct. The intake of the aqueduct is equipped with gates which, when open, admit the gravity flow of the river and can be closed to exclude all water and permit it to flow down the channel of Owens River which terminates and empties into Owens Lake. Owens Lake originally covered an area of about 65 square miles and has no outlet so that its waters have been saline in so far as available records disclose.

The aqueduct had a capacity of 800 second feet from Intake to Haiwee Reservoir which is a few miles south of Owens Lake. Haiwee is a storage reservoir with a capacity of 58,525 acre feet of water. South of the reservoir the aqueduct originally had a capacity of 400 second feet which was later increased to 480 second feet. Defendants argue that these capacities are theoretical and that due to natural causes its actual capacity is ten per cent below these figures. The aqueduct runs along the westerly side of Owens River and Owens Lake. Ever since its construction it has been equipped with gates situated between Intake and Haiwee Reservoir so that the entire flow can be diverted into Owens River.

Owens River finds its source in the eastern slope of the Sierra Nevada Mountains in Mono County. It is fed by four or five streams in Mono County and by about twenty streams in Inyo County. Generally these streams enter the river from the west and carry water resulting from rains and melting snow. The river has always had a defined channel to its terminus in Owens Lake.

In 1929 defendants completed Tinnemaha Reservoir. This was constructed by building an earth fill across the river. It had a capacity of 16,405 acre feet. It was constructed as a regulating reservoir and not for storage of water. Normally water passed through pipes at the base of the dam and down the channel to the intake of the aqueduct. There were gates on these pipes that could be closed. During periods of high water any surplus could pass over spillways on the top of the dam.

Plaintiff in its arguments, and the findings treat the Tinnemaha Reservoir and the river channel below it down to Intake as part of the aqueduct system. Defendants regard the aqueduct as commencing at Intake. This accounts for the extended arguments of counsel as to whether the high waters of 1937 and subsequent years were diverted out of or excluded from the aqueduct at Intake. We regard this controversy as unimportant.

The evidence discloses that defendants never diverted the entire flow of the river into the aqueduct at Intake except in one year and perhaps two others. In all other years some water ran down the channel of the river to the lake. Plaintiff admits an annual flow into the lake of about ten second feet. There is no finding of the diversion of all the flow of the river into Intake except for the one year. In years of high water a very substantial part of the flow of the river found its way into the lake. In 1916 the river flow was 487,000 acre feet, of which 96,000 acre feet were taken into the aqueduct. In 1917 the river flow was 353,000 acre feet, of which 124,000 acre feet were taken into the aqueduct. In 1922 the flow was 360,000 acre feet with 250,000 acre feet taken into the aqueduct. In 1937 the flow was 368,000 acre feet with 271,000 acre feet taken into the aqueduct. In 1938 the flow was 565,000

acre feet with 288,000 acre feet taken into the aqueduct. The measurements of the river flow were taken at Charlies Butte several miles above Intake, and the measurements of the flow into the aqueduct were taken at or near Intake. (All water measurements given in this opinion are approximations and not exact.)

A cycle of water scarcity in the Owens River watershed started in about 1919, a number of years before plaintiff acquired its property, and extended for several years thereafter. The deficient water supply was continuous with the exception of isolated years. To supplement its water supply defendants drilled a number of wells from which water was pumped during years of scarcity. During years of plentiful water pumping was stopped though some of the wells flowed.

The theory on which the judgment is based is this: That the aqueduct, being a permanent structure, constituted a new channel for the waters of Owens River; that the existence and use of this new channel was acquiesced in for many years by all parties concerned; that the conduct of defendants over these years, which was acquiesced in by others, constituted representations to the others on which they were entitled to rely; that defendants would take water into the aqueduct up to its reasonable capacity and reasonable operation so that none of those waters would reach Owens Lake.

In this connection it should be noted that defendants had never used the aqueduct to its full continuous capacity. The lowest recorded river flow was 158,000 acre feet in 1924 when all of the flow was taken into the aqueduct. The next lowest flow was 189,000 acre feet when most of the water was taken. In other years the river flow varied as did the amount of water taken by defendants.

In none of them did defendants take all of the river flow and in some of them the flow into Owens Lake through the river channel was very substantial. To illustrate, the river flow into Owens Lake was over 200,000 acre feet in 1917, over 100,000 acre feet in 1927, and about 70,000 acre feet in 1930.

The total consumption of water, including water from the Los Angeles River basin, by the City of Los Angeles, ranged from 193,000 acre feet in 1919 to 273,000 acre feet in 1929, followed by a gradual decline to 222,000 acre feet in 1934, which increased to 234,000 acre feet in 1935, 260,000 acre feet in 1936, 257,000 acre feet in 1937, 251,000 acre feet in 1938, and 253,000 acre feet in 1939.

The first problem confronting us is a consideration of the claimed duty of defendants to conserve all of the water of the Owens River and not to permit any of it to waste. Counsel for plaintiff and the attorney general argue that as Los Angeles had appropriated 4000 second feet of water, much more than the total flow of the river, it was required by section 3 of article XIV of the Constitution to put its water to reasonable use and not to waste it. It is argued that as defendants had taken control of all of the waters of the Owens River flowing into the Tinnemaha Reservoir it was prohibited from wasting any of that water; that permitting it to flow into a saline lake was a waste of water as its usefulness was thereby destroyed.

In considering this problem two major questions arise: To what extent did the appropriation of more than the entire flow of the river vest ownership of the use of all of the water in defendants? Was possession and control taken of all the waters of the river flowing into Tinnemaha Reservoir which would require defendants to put it to beneficial use?

Section 1411 of the Civil Code provides as follows: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

The foregoing section was construed and applied in *Smith v. Hawkins*, 120 Cal. 86 [52 P. 139, 140], where the court said: "It is neither the capacity of the ditch nor the amount originally appropriated which determines plaintiffs' rights. If plaintiffs could forfeit their entire right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure; in other words, the necessary result of the principles declared on that appeal is that, no matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser."

The rule is thus stated in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82 [106 P. 404, 406, 29 L. R. A. N. S. 213]: "Therefore the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured as are the rights of every other private appropriator . . . not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land; but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water

would also be measured according to these facts and limited to this quantity."

In *Hufford v. Dye*, 162 Cal. 147 [121 P. 400, 403], it was held that where an appropriator failed to put all of the water appropriated to a beneficial use he lost the right to the surplus. The court stated the reason underlying this rule as follows:

> "It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose . . . He (plaintiff) is only entitled to what he needs and when he needs it, and has no right to complain of another appropriator taking it for beneficial purposes when he has no use for it. The use of water in this state is of such great necessity as to preclude its being allowed to run to waste, and its full beneficial and economical use requires that when the wants of one appropriator are supplied another may be permitted to use the flow for his benefit." (See, also, *Senior v. Anderson*, 115 Cal. 496 [47 P. 454]; *California, etc. Co. v. Madera, etc. Co.*, 167 Cal. 78 [138 P. 718]; *Simons v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524 [192 P. 144]; *Akin v. Spencer*, 21 Cal. App. (2d) 325 [69 P. (2d) 430].)

It follows that the right to the use of waters from the streams of the state is limited to the amount of water actually put to beneficial use regardless of the amount of water that may be appropriated. As the appropriator has no right to the use of the water appropriated over the quantity put to beneficial use, and as the appropriator gains no ownership of the water itself by the appropriation but

only the right to its use, it follows that an appropriator acquires only rights in the quantity of water put to beneficial use and that he cannot be required to restrain and divert water in excess of that quantity; that the diversion of a greater quantity would be contrary to the spirit and intent of the water law of the state. He should not be required to waste the surplus onto the desert or into the sea.

Here we have a fast growing municipal corporation that acquired water rights far in excess of its present needs. It built an aqueduct to convey that water to its boundaries. This aqueduct had a capacity much beyond those present needs. The city was looking to the future and anticipating the future needs to be occasioned by its growth in population. Should we require it to take into its aqueduct system water to the full capacity of that system and beyond its present needs, or be responsible for any damages caused by the water which it did not need and could not use which flowed down the natural channel of the river from which diversions were made? If we should so hold we would establish a rule for which we can find no precedent and which would seriously handicap all growing municipalities in providing for future increases in population and consequent needs.

Any such rule, if established, would require such a municipality to acquire only such water as it could presently use and to build a conveyor system of a capacity exactly equalling those needs. When those needs increased it would be put to the necessity of acquiring additional water rights, if it could, and of going to the considerable added expense, over the cost of the original construction, in either enlarging or paralleling its conveyor system. Such a rule would be both improvident and economically unsound. A

city, like a person, should be permitted to anticipate future needs and build up a reserve for the proverbial rainy day. Of course its right to retain the use of a quantity of water beyond present needs and against subsequent beneficial use of the surplus by another may be questionable, but it certainly should be permitted to build a water transportation system of sufficient capacity to meet the needs of the future when that need arises without subjecting itself to a damage action such as we have here.

It has been held that as between a riparian owner and an appropriator the doctrine of beneficial use does not apply. (*Miller & Lux v. Madera Canal, etc. Co.*, 155 Cal. 59 [99 P. 502, 22 L. R. A., N. S. 391]; *Miller v Bay Cities Water Co.*, 157 Cal. 256 [107 P. 115, 27 L. R. A., N. S. 772]; *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81 [252 P. 607]; *Gin S. Chow v. Santa Barbara*, 217 Cal. 673 [22 P. (2d) 5].) But we have here no such situation as presented in those cases. If plaintiff may be regarded as a riparian owner it is not asserting its right as such to have the waters of the Owens River flow to its property for use there, but it is seeking to compel the upstream appropriator to divert the water of the river from its original channel or to store those waters and to prevent them from reaching plaintiff's properties. This is the exact converse of the usual controversy between a lower riparian owner and an upstream appropriator and presents a situation most novel in the courts in this state. The question of the applicability of the doctrine of beneficial use here presents no great difficulties as plaintiff acquired its property and the cause of action arose after the adoption of section 3 of article XIV of the Constitution which establishes rules governing this situation.

Tinnemaha Dam was not built for the purpose of entirely checking the entire flow of the river and storing water behind it. It was rather to regulate the flow of the river and to level off the crests of the floods. The pipes through its base had a capacity of 800 second feet, the exact capacity of the aqueduct above Haiwee Reservoir, which was more than the usual flow of the river. Ordinarily the water flowed through the pipes in the base of the dam and down the river just as it would have done had there been no dam constructed.

This method of construction and operation does not indicate any intention to appropriate and use all of the water of the river. It rather evidences an intention to control its flow and thus put as much of that water to beneficial use as was necessary to supply the needs of the city.

As we have already seen, the appropriator gains no title to the water on which he files but only the right to its use and only to so much of it as he puts to a beneficial use. As held in the cases already cited, the size of his ditches or works do not determine the quantity of water he is entitled to use. It is determined by the quantity he puts to beneficial use. In this case that quantity is determined by the quantity of water taken into the aqueduct proper and used by the inhabitants of the city, or held in storage for their use, which is the extent of the right of defendants to the waters of the river, and not the quantity entering Tinnemaha Reservoir even though some of it may have been temporarily restrained there.

For these reasons the construction of Tinnemaha Reservoir did not establish any ownership of the use of all the waters entering it but only that portion put to beneficial use. Thus defendants were not required to store

all water flowing down the river nor were they required to find some beneficial use for all of it. They could permit the surplus above reasonable needs to follow the channel of the river to the destination provided by nature.

Section 3 of article XIV of the Constitution was adopted in 1928. It was first applied in the case of *Gin S. Chow v. Santa Barbara, supra.* It was carefully analyzed and applied in *Peabody v. City of Vallejo,* 2 Cal. (2d) 351 [40 P. (2d) 486, 491], where the Supreme Court said:

> "The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:
>
> "1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.
>
> "2. Such right does not extend to the waste of water.
>
> "3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.
>
> "4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.
>
> "The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed."

The doctrine of beneficial use has not been abolished by the constitutional amendment but rather it has been written into the fundamental law of the state with some restrictions on the prior definitions of the phrase. In the *Peabody* case [2 Cal. (2d) at page 368, 40 P. (2d) at page 492], it was said:

> "The right to the waste of water is not now included in the riparian right. As to what is waste water depends on the circumstances of each case and the time when waste is required to be prevented. In sections of the state, few in number, where the rivers and streams are plentifully supplied, and there is no need for the conservation of the product thereof, the water flows freely to the sea. When needed for beneficial uses it may be stored or restrained by appropriation subject to the rights of those who have a lawful priority in a reasonable beneficial use. That priority has been subjected to limitations and regulations prescribed by the Constitution, but it has by no means been abolished. Under the new policy the vested right theory, that is, the right of the riparian owner to all of the waters of the stream, as it is wont to flow in the state of nature, and without regard to the reasonableness of such use as against an appropriator, has been subjected to such limitations that the old doctrine declared in Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59 [99 P. 502, 22 L. R. A., N. S. 391], is no longer the law of this State. Also distinctions heretofore made between the unusual or extraordinary and the usual or ordinary flood and freshet waters of a stream are no longer applicable."

Plaintiff argues that under this constitutional provision defendants are required to restrain all of the waters of the river which they had appropriated, to the capacity of their system; that to permit any of those waters to flow down the original river channel and become saline in Owens Lake was a waste of water that is prohibited by the Constitution.

It is true that the river water reaching Owens Lake is wasted in so far as its use for domestic purposes and irrigation are concerned. But Owens Lake was the repository provided by nature for that water. Had there been no use by diversion of the river water all of the flow would have reached the lake and become saline. Can it be said that permitting water to flow down its natural river channel and reach its ultimate destination provided by nature is "the waste or unreasonable use or unreasonable method of use" prohibited by the Constitution? "Waste" and "unreasonable use" and "unreasonable method of use" are all linked together in the section. Certainly "unreasonable use" and "unreasonable method of use" must refer to the use of water by humans. If that is true the "waste" of water should be held to refer to its waste by humans and not in permitting water to flow in its natural channel to the terminus provided by nature. If this be not true then it is waste to permit the rivers of the state to empty their waters into the sea. We cannot differentiate between the "waste" of water in a saline lake and the "waste" of water into the salty sea. In both cases the water becomes unfit for human consumption and use in irrigation.

We cannot import to the people of the state, in adopting this section, any intention to prohibit the waters of the Sacramento and San Joaquin Rivers from reaching the sea during the periods of high water which occur almost

every year and often reach serious flood proportions. Irrigation stops and domestic use lessens during periods of heavy rainfall. During such times riparian waters and waters appropriated by others mingle with the other waters of the rivers and streams, including flood and vagrant. The combined waters often produce damaging floods that as yet have not been controlled. To require the owners of these rights to use such waters, or portions of them, to impound them in reservoirs or to develop beneficial uses for them, would place an intolerable if not an impossible burden upon them that would thwart the very purpose of the amendment which clearly is to conserve the water resources of the state, prohibit their monopolization by claimants who have no beneficial use for them, permit the orderly development of the arid regions and provide for needs of a growing population. This is done by declaring the title to all waters to be in the state and permitting private ownership of the right to their use to those persons, corporations and public bodies who can provide a beneficial use for portions of them. The waste referred to in the section cannot refer to the waste of those waters into saline lakes or the sea through the channels provided by nature, but the waste through artificial means built by riparian owners or appropriators.

Twice it has been held that permitting the discharge of the waters of rivers through natural channels into saline lakes which were their natural termini was not the waste of waters prohibited in section 3 of Article XIV of the Constitution (*City of Los Angeles v. Aitken*, 10 Cal. App. (2d) 460 [52 P. (2d) 585]; *City of Elsinore v. Temescal Water Co.*, 36 Cal. App. (2d) 116 [97 P. (2d) 274].)

Plaintiff argues that as the aqueduct was constructed so as to be permanent in character and so as to convey, and having conveyed, the major portions of the waters of Owens River for a great many years, it has become the channel of the river through which defendants must permit its waters to flow; that plaintiff, having acquired and improved its properties while relying on the existence of this channel and its continued operation as the channel carrying the major flow of the river, was entitled to demand its continued use as such and was entitled to recover damages caused by the failure of defendants to so use it.

Counsel argue at considerable length the question of whether the aqueduct possessed any of the characteristics of a river channel and whether an aqueduct built by a municipality for the sole purpose of supplying the needs of its inhabitants could be regarded as the channel of a river. While the arguments of defendants on this question contain much logic we need not lengthen this opinion by considering the question.

The leading case in California on the question of an artificial channel becoming a river channel is *Chowchilla Farms, Inc., v. Martin*, 219 Cal. 1 [25 P. (2d) 435, 441]. There the Supreme Court carefully considered numerous authorities from this and other jurisdictions bearing on the question so it is unnecessary for us to review them and others cited by counsel.

After reviewing numerous cases the Supreme Court said:

> "We find that text-writers whose works have been accepted as authority upon the subject of water rights are in accord with the authorities above cited . . .

"In *Wiel on Water Rights*, volume 1, section 60, that author states the law as follows: 'There is further an established principle that by lapse of time an artificial watercourse may come to be regarded as equivalent to a natural one. These cases do not depend exactly upon prescription, for, as above shown, prescription, properly speaking, cannot run in favor of lower parties upon a flow as against parties higher up. They rest rather upon what some of the cases call ordinary dedication to a class of public which, in the course of time, has established itself upon the basis of the artificial condition. Where the creator of the artificial condition intended it to be *permanent*, and a community of landowners or water users has been allowed to adjust itself to the presence and existence of the artificial watercourse or other artificial condition, acting upon the supposition of its continuance, and this has proceeded for a long time beyond the prescriptive period, the new condition will be regarded as though it were a natural one, its artificial origin being then disregarded by the law as it has been by the community. The creator of the artificial watercourse will be held to have dedicated it to the use of the community that has by long time become adjusted to it.' . . . In line with the foregoing we cite the following authorities: *Hornor v. City of Baxter Springs*, 116 Kan. 288 [226 Pac. 779]; *Ellis v. Tone*, 58 Cal. 289; *Paige v. Rocky Ford Canal, etc. Co.*, 83 Cal. 84 [21 Pac. 1102, 23 Pac. 875]; *Harrington v. Demaris*, 46 Or. 111 [77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756]; *Smith v. Youmans*, 96 Wis. 103 [70 N. W. 1115, 65 Am. St. Rep. 30, 37 L. R. A. 285]; *Delaney v. Boston*, 2 Harr. (Del.), 489; *Shepardson v. Perkins*, 58 N. H. 354; *Woodbury v. Short*, 17 Vt. 387 [44 Am. Dec. 344]; *Rait v. Furrow*, 74 Kan. 101 [85

Pac. 934, 10 Ann. Cas. 1044, 6 L. R. A. (N. S.) 157]; *City of Reading v. Althouse*, 93 Pa. St. 400."

The authorities are not in accord as to the exact principle upon which rests the right to regard the artificial channel as the channel of a stream. Some base it on long acquiescence in the new condition, others on reciprocal rights based on uses for periods beyond the statute of limitations, and still others on something akin to equitable estoppel as well as on other grounds. As was said in *Hammond v. Antwerp Light & Power Co.* [132 Misc. 786], 230 N. Y. S. 621: "The principle is the same, whether it be called reciprocal rights, equitable estoppel, or any other name." Regardless of the name that may be given to the right, there runs through all the cases the reasoning that there must be long acquiescence in the new condition by all parties affected before the artificial channel will be regarded as the channel of the river. This seems to be a universal requirement of the courts and it furnishes a convenient gauge with which to measure the rights of the parties here.

It is clear that before there can be acquiescence in the conditions there must be knowledge of those conditions, for acquiescence imports tacit consent, concurrence, acceptance or assent. There can be none of these without knowledge. Further, the acquiescence must be in those conditions that exist during the period in which it is claimed to have occurred. A person cannot be said to acquiesce in a condition that did not exist nor in a situation that arose after the period of acquiescence had passed and the action based on acquiescence had been filed. With these observations in mind we must proceed to consider the conditions in which it might be said the parties ac-

quiesced and thereby measure the right (if such right existed) of plaintiff to demand that defendants "take into their aqueduct system, all of the flow of Owens River which they could take up to the reasonable capacity of said aqueduct system and its appurtenant facilities, reasonably constructed and reasonably operated" as found by the trial judge as the foundation for the judgment.

Tinnemaha Reservoir was neither constructed nor operated as a storage reservoir but rather to level out the flow of the river. Intake was equipped with gates so that varying quantities of the river water could be admitted into the aqueduct or all of it excluded and turned down the river. Any excess water over that taken into the aqueduct had no other course to follow than down the natural river channel into Owens Lake. Except in isolated years of extreme drought all the river water was not taken into the aqueduct at Intake and some of it found its way down the natural channel into Owens Lake. Plaintiff admits this latter fact. A report submitted to plaintiff's representative before the purchase contained the following:

> "The general situation in respect to resources on the lake is somewhat as follows: The meander line, being essentially the original shore line of the lake was surveyed first in 1859. This lake was the dead end where the discharge of the Owens River was impounded without outlet. A condition of stability continued until during 1915, the waters of the Owens River were diverted for purposes of the Los Angeles (city) water supply. The shore line continually receded from 1915 until in 1920 the present condition of stability established itself. Underground streams, shore wells and remaining portions of the

> Owens River discharge continue to flow into the remaining lake area so that at present the incoming fresh water is balanced by the combination of natural evaporation and brine withdrawal by the industries."

Thus plaintiff had actual notice that waters from Owens River flowed into Owens Lake through the natural channel before it purchased its properties in 1932.

The structural construction of the aqueduct above Haiwee Reservoir was such as to give notice to anyone who chose to inquire that the entire flow of the river might be excluded from the aqueduct at Intake and permitted to flow down the natural channel to Owens Lake; that the entire flow of the aqueduct might be turned out of it before the water reached Haiwee Reservoir, into the natural channel of Owens River and find its way into Owens Lake.

Plaintiff maintains that it had no actual knowledge of these various structures. Still it relies on acquiescence. How can there be acquiescence without knowledge? Its plea of ignorance defeats its plea of acquiescence.

Before its purchase in 1932 and again before it spent large sums of money in enlarging and improving its works shortly before 1937, plaintiff made no serious effort to ascertain the flow of Owens River in preceding years, nor the amount of that flow taken by defendants for municipal use. Its inquiries along those lines were most casual. Information sought by its representatives was furnished by officers of the City of Los Angeles but plaintiff did not seek to learn the flow of the Owens River during various years nor the amount of water taken into the aqueduct at

Intake nor the consequent discharge of water down the natural channel into the lake.

Had they investigated they could have learned the flow of Owens River at Charlies Butte in 1927, a year of fairly generous precipitation. They could have learned that this flow materially exceeded the water taken into the aqueduct at Intake and that consequently there was a considerable discharge into Owens Lake. The following figures give the river flow in second feet. The first figure following each month is the maximum, the second the minimum, and the third the mean flow for that month: January—390, 335, 369; February—696, 334, 456; March—540, 367, 424; April—517, 118, 228; May—250, 88, 152; June—686, 171, 467; July—634, 394, 498; August—442, 105, 182; September—282, 84, 161; October—358, 264, 325; November—516, 360, 412; December—414, 369, 385. In that year approximately 101,000 acre feet of water reached Owens Lake. The river flow in the years 1937 and 1938 materially exceeded the flow of 1927. About 62,000 acre feet reached Owens Lake in 1937 and about 251,000 acre feet in 1938 which was a year of heavy precipitation. Here again acquiescence cannot be predicated on ignorance.

Had plaintiff had knowledge of all necessary facts, the structural construction of the aqueduct and the conduct of the parties would have disclosed the following upon which acquiescence must be predicated: That only in a year, or a very few years, of extreme drought did defendants divert all of the flow of Owens River into the aqueduct at Intake; that in years of water deficiency they diverted a considerable portion of that flow, but that water ran down the natural river channel into Owens

Lake; that during years of average or excess precipitation it diverted a smaller percentage of the river flow and considerable quantities of water followed the natural channel into Owens Lake; that the gates at Intake might be closed thus sending all of the flow of the river down the natural channel into the lake; that the discharge gates on the aqueduct above Haiwee Reservoir might be opened thus turning all the water into the natural channel and through it into Owens Lake.

These facts, if acquiesced in, fail to establish that the aqueduct is a new channel for Owens River. Nor do they establish the abandonment of the natural channel of the river. They contain no representation to the effect that defendants would divert into its aqueduct at Intake water to the reasonable capacity of the aqueduct system reasonably operated as found by the trial court. Acquiesence in these conditions cannot support the theory on which the judgment is based.

As the natural channel of Owens River had not been abandoned by the substitution of the aqueduct, as its channel, defendants breached no duty they owed to plaintiff by permitting waters of the Owens River to flow down that natural channel and reach the resting place provided by nature in Owens Lake. It follows that plaintiff can neither enjoin defendants from permitting the waters of the Owens River (not taken into the aqueduct at Intake) from flowing down that natural channel nor can they recover for damages caused by those waters after they reached the terminus provided by nature.

The trial court found that the aqueduct was negligently constructed, and negligently operated in 1937 and 1938,

which negligent construction and negligent operation were the proximate cause of the damages suffered by plaintiff.

The negligence charged to defendants consists principally of the following classes of acts or omissions: The negligence of construction was the failure to build a water storage reservoir of large capacity above the Tinnemaha Reservoir. The negligent operation was the failure to use spreading facilities already constructed, failure to fill the aqueduct and reservoirs to capacity and waste water on the desert below Haiwee Reservoir or elsewhere, and turning water taken into the aqueduct at Intake out of it through the gates above Haiwee Reservoir so that it would again reach the natural river channel and flow through it into Owens Lake.

Plaintiff asserts that before the purchase of its properties in 1932, defendants made provision for the construction of a large storage reservoir near Long Valley in Inyo County; that this construction had been started, probably as early as 1930, and was abandoned. Defendants say that construction was abandoned because the natural formation under the dam where work was started proved unsuitable for its foundation. The dam at Long Valley was started at a much later date and was completed in 1940, with a storage capacity of 183,000 acre feet. Engineers testified for plaintiff that the failure to construct this storage reservoir at a much earlier date constituted negligence and faulty construction and was poor engineering practice.

All this may be true but we cannot see how the failure to construct this dam before the high water of 1937 can aid plaintiff. As we have already seen, defendants were not required to store or take water in excess of the quan-

tity which could be put to beneficial use. After about 1925, the flow of the river exceeded the water taken into the City of Los Angeles. The water reaching Los Angeles, plus the water from the Los Angeles River, had been sufficient to supply the municipal demands so there had been no water shortage there. There was no duty imposed on defendants to take or store water in excess of its reasonable demands. It was not required to take or store water beyond its needs merely to protect lower owners or operators from the results of that water flowing down its natural channel and emptying into the terminus provided by nature. Had the aqueduct system not been completed and in operation in 1937 and 1938, the river flow actually reaching Owens Lake would have been augmented by the quantities of water taken by defendants which reached Los Angeles. Thus instead of increasing the flow of the river into Owens Lake in those two years, that flow was reduced by the water taken by defendants.

Further, the case of plaintiff rests on the acquiescence of the parties in existing conditions created by the aqueduct and its works. How there can be any acquiescence in a condition, or reliance on the effect of a structure that did not exist, we fail to understand.

Defendants had constructed drains below Tinnemaha Reservoir to conduct any seepage from it back into the natural river channel, and below Haiwee Reservoir to conduct any seepage back into the aqueduct. These seepages originally were part of the natural flow of the river and, as we have seen, defendants owed no duty to plaintiff to restrain the river flow and to keep it from proceeding down the natural channel to Owens Lake. We are pointed to no evidence of any serious seepage from the aqueduct proper.

Defendants had constructed spreading works to retard the flow of surface waters and stream waters so that some of them would be absorbed into the ground, ultimately reaching underground gravels, to be pumped out during seasons of water shortage. The spreading works were not used in 1937 and 1938. The trial court found that the failure to use them was negligent operation of the aqueduct system. Defendants urge that during much of the time the spreading works were not operated the ground was frozen and would not absorb water so that an attempt to operate them would have been useless. Be that as it may, we cannot see how the failure to operate these spreading works can affect this case. A lower owner cannot complain because surface waters reach his property. (*Mogle v. Moore*, 16 Cal. [2d] 1, [104 P. (2d) 785].) In the course of nature these surface waters and stream waters had found their way into Owens River and had flowed down its channel to Owens Lake. Certainly the spreading works, whether operated or not, did not increase the natural river flow. As defendants owed plaintiff no duty to restrain the flow of surface waters nor to control or restrain the flow of streams or rivers in their natural channels we can find no negligence for which defendants can be liable in the failure to restrain the flow of water which had Owens Lake as its natural terminus.

We need spend little time on the failure of defendants to fill the aqueduct to its capacity during the period in question or to waste water onto the desert so as to reduce the flow into Owens Lake. There are constitutional provisions preventing defendants from taking water beyond its needs, and there is the lack of duty on defendants to divert unnecessary water from the natural

channel of the river. This we have already emphasized. As a matter of fact defendants did waste water onto the desert and down the Santa Clara River in an effort to reduce the flow of Owens River into Owens Lake.

The evidence shows that for short periods the gates in the aqueduct above Haiwee Reservoir were opened so that the flow of the aqueduct was diverted into Owens River and found its way into Owens Lake. Defendants maintain that the diversion of this water was done because the aqueduct had iced over and to prevent ice jams and the entry of debris and injurious foreign substances into the system. The trial court found against defendants on all these subjects except the aqueduct being iced over. We are pointed to no finding on that subject.

The question of the liability of defendants for damages caused by water once taken into the aqueduct proper and then turned out of the system, as found, might present an interesting question for study were we required to decide it. The damages estimated and found, were based on the total amount of water reaching Owens Lake, part reaching the lake through the length of the natural channel and part through the lower portion of that channel after having been discharged from the aqueduct through the gates above Haiwee Reservoir. There was no effort to segregate the damage caused by waters from these separate sources. It would seem probable that much less water was turned out of the aqueduct through these gates than flowed down the length of the channel. If there is any liability on defendants for damages caused by the water turned out through the gates some effort should be made to determine the damages, if any, caused by that water before we should be required to determine the entire ques-

tion. We are not required to determine whether the right of the plaintiff, if any, to have the water entering the aqueduct retained in it must yield to the public welfare of the more than a million inhabitants of the City of Los Angeles. We expressly refrain from deciding the question of the liability of defendants, if any, for damages caused by water turned out of the aqueduct after it had entered it at Intake.

Nothing in this opinion should be construed as a holding that a municipality may not store water for future municipal use beyond the quantity immediately necessary for present use.

It is not necessary to consider the other questions raised by defendants.

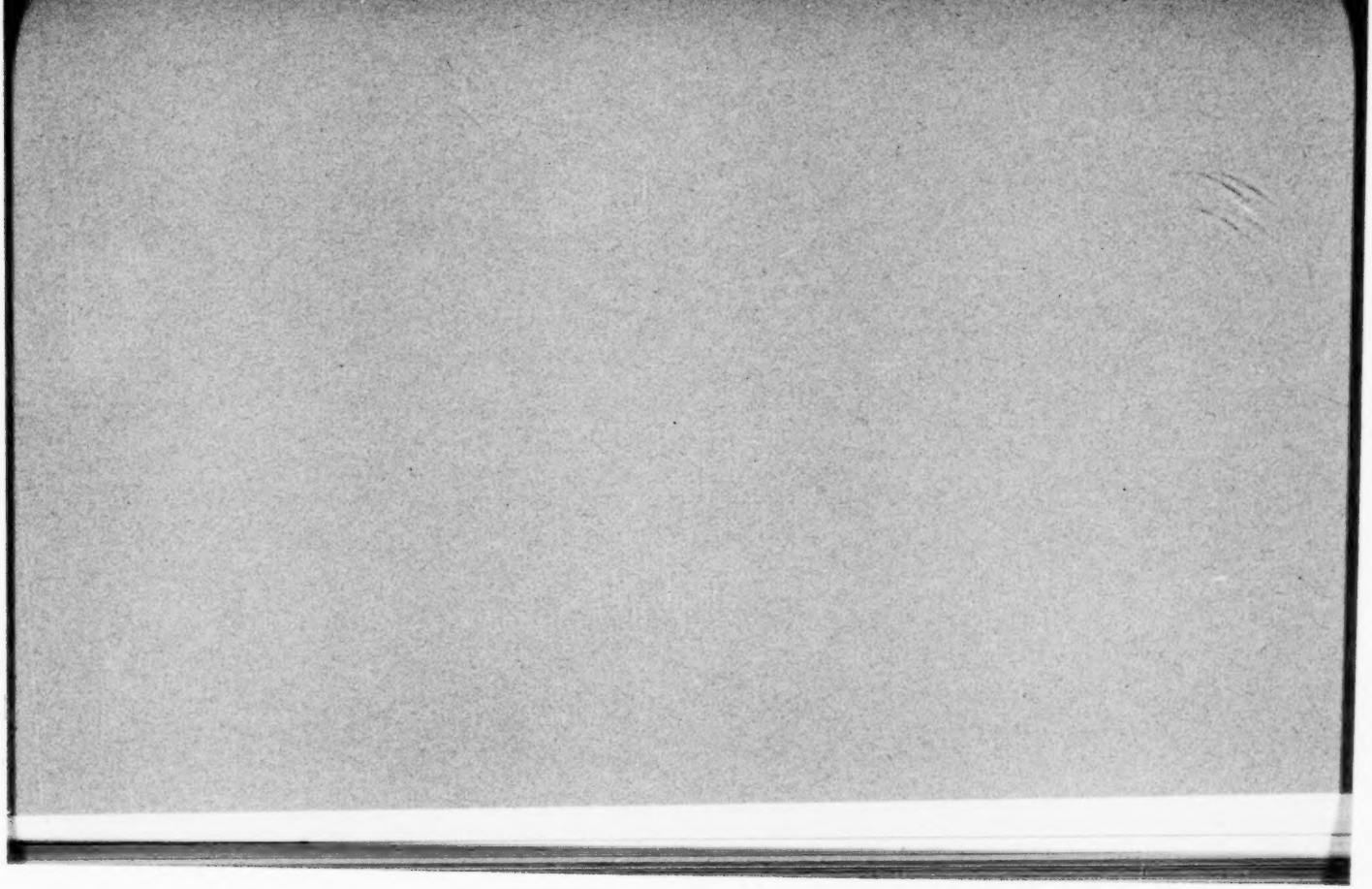
The judgment is reversed.

MARKS, *J.*

We concur:

BARNARD, *P. J.*

GRIFFIN, *J.*



APPENDIX C.

Constitution of the United States, Section 1 of Article XIV of the Amendments thereto:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judicial Code of the United States, Section 237, as amended (United States Code Annotated, Title 28, Section 344):

> "§344. (Judicial Code, section 237, amended.) Appellate jurisdiction of decrees of State courts; certiorari. * * *.
>
> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, * * * of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on

a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Constitution of California, Article I, Section 13:

"§13. *Personal and property rights.* * * No person shall * * * be deprived of life, liberty, or property without due process of law. * * *."

Constitution of California, Article XIV, Section 3:

"§3. *Conservation of water.* It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream

to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the legislature may also enact laws in the furtherance of the policy in this section contained. [New section added by amendment adopted November 6, 1928.]"

Civil Code of California, Sections 1410, 1411, 1415 and 1416:

"§1410. [*How rights to water may be acquired.*] All water or the use of water within the state of California is the property of the people of the state of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law; * * * [Enacted 1872; Am. Stats. 1911, p. 821.]"

"§1411. *Appropriation must be for a useful purpose.* The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. [Enacted 1872.]"

"§1415. [*Notice of appropriation.*] A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;

2. The purposes for which he claims it, and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. * * *. [Enacted 1872; Am. Stats. 1903, p. 361.]"

"§1416. [*Work to be done in appropriation of waters.*] Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; * * *

Provided, that whenever any city and county, or any incorporated city or town within this state makes, or has made, or acquires, or has acquired any appropriation of any of the waters of this state in accordance with the provisions of section 1415 of this code, it shall not be necessary for such city and county, city or town to commence the work for development of more of the water so claimed than is actually necessary for the immediate needs of such city and county, city or town, and it shall be held to be a sufficient compliance with the requirements of this chapter, to the full amount of water stated in the notice posted and recorded, for such city and county, city or town to within sixty days make the necessary surveys, or within six months to authorize the issuance of municipal bonds, for the construction of the necessary works designed to supply such city and county, city or town with the water required for immediate use. * * * [Enacted 1872; Am. Stats. 1895, p. 70; Stats. 1903, p. 396; Stats. 1907, p. 780; Stats. 1911, p. 1419.]"

Water Commission Act of California, Sections 20 and 20a [Cal. Stats. 1917, Chapter 554, pp. 746-748]:

"Sec. 20. All permits and licenses for the appropriation of water shall be under the terms and conditions of this act, and shall be effective for such time as the water actually appropriated under such permits and licenses shall actually be used for the useful and beneficial purpose for which said water was appropriated, but no longer; and every such permit or license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this section and likewise the statement that any appropriator of water, to whom said permit or license may be issued, shall take the same subject to such conditions as therein expressed; * * * If it shall appear to the state water commission at any time after a permit or license is issued as in this act provided that the permittee, or licensee, * * * has not put the water granted under said permit or license to the useful or beneficial purpose for which the permit or license was granted, or that the permittee or licensee, has ceased to put said water to such useful or beneficial purpose, * * * then and in that case the said commission, * * * may revoke said permit or license and declare the water to be unappropriated and open to further appropriation in accordance with the terms of this act. * * *"

"Sec. 20*a*. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water."